09-16942

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, a federally recognized Indian Tribe,

Plaintiff-Appellee,

PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, a federally recognized Indian Tribe,

Plaintiff-Intervenor-Appellee,

V.

STATE OF CALIFORNIA; CALIFORNIA GAMBLING CONTROL COMMISSION, an agency of the State of California; ARNOLD SCHWARZENEGGER, Governor of the State of California,

Defendants-Appellants.

BRIEF OF *AMICUS CURIAE* CALIFORNIA NATIONS INDIAN GAMING ASSOCIATION

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I. INTEREST OF AMICUS CURIAE CALIFORNIA NATIONS INDIAN GAMING ASSOCIATION

The California Nations Indian Gaming Association ("CNIGA") is a non-profit California corporation consisting of 32 federally recognized California Indian tribal governments. CNIGA's core mission is to defend tribal governmental authority in Indian country within California. In furtherance of that objective, CNIGA seeks to preserve and foster the opportunity for all California tribes to attain economic self-sufficiency and maintain strong tribal governments through the exercise of the right to conduct tribal government gaming under the Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. §§2701, 2702(1).

To fulfill its mission, CNIGA operates as an information clearinghouse and educational, legislative and public policy resource for tribes, policymakers and the public concerning Indian gaming issues and tribal community and economic development. In this capacity, CNIGA works with state and federal agencies, including defendant California Gambling Control Commission, to develop sound policies and practices and to provide technical assistance and advocacy regarding issues pertaining to tribal government gaming.

CNIGA's 32 member tribes are located throughout the State of California, from the Sycuan Band of the Kumeyaay Nation and Mesa Grande Band of Mission Indians in southern San Diego County to the Smith River Rancheria and Elk Valley Rancheria in Del Norte County near the Oregon border. About two-thirds

of CNIGA's member tribes have signed gaming compacts with the State of California, while one-third do not have compacts or gaming facilities. Most CNIGA member tribes with compacts have the same 1999 Compacts as do the Appellees Colusa Indian Community and the Picayune Rancheria of Chukchansi Indians. In addition, CNIGA has one member tribe, the Coyote Valley Rancheria, that signed its first compact several years after the 1999 negotiations and three tribes that signed 1999 compacts but subsequently entered into amendments to their original Compacts. Notwithstanding the diversity of interests, compacts, and other circumstances, CNIGA's member tribes voted unanimously to support Colusa and Picayune in their defense of the district court's judgment in this action.

Receipt of this *amicus* brief would be of assistance to the Court because this case involves one of the most fundamental questions regarding the meaning of the 1999 Tribal-State Gaming Compacts. These issues have the potential to affect many of California's Indian tribes, including non-compact tribes that benefit from tribal government gaming by receiving disbursements from the Indian Gaming Revenue Sharing Trust Fund created by the Compacts and implemented by the State Legislature.

The legal issues in this appeal merit not only careful legal analysis, but also an analysis that is fully informed in terms of its consequences for all of California's tribal governments. Consideration of CNIGA's unique and broadly representative

viewpoint will facilitate that analysis. In particular, CNIGA's views on the effect of the number of available licenses in the statewide license pool established by the 1999 Compacts and the effect on tribes across California of continued delay in providing access to those licenses will be helpful to the Court.

II. INTRODUCTION

Previously, CNIGA joined in the tribal Appellees' opposition to the State's emergency motion for a stay pending appeal. CNIGA now joins the Appellee tribes in seeking to uphold the district court's judgment. The district court correctly determined as a matter of law that the 1999 Compact authorizes the issuance of 42,700 gaming device licenses, and that every draw of licenses must be open to all tribes with 1999 Compacts that are not yet authorized to operate the maximum 2,000 gaming devices allowed under the 1999 Compact.

CNIGA strongly opposes the State's attempt to further stall and frustrate the purposes of the 1999 compacts. The State's tactics and arguments simply seek to prolong the conclusion of this already too-protracted litigation. The State's approach has forever deprived numerous tribes of badly-needed governmental revenues. The only discernable benefit whatsoever to the State of these tactics has been as inequitable leverage with which to coerce tribes into accepting oppressive terms in amended Compacts in exchange for escaping the State's unilaterally,

arbitrarily and unlawfully imposed limit on the number of licenses authorized by the 1999 Compact.

III. ARGUMENT

A. NO GENUINE ISSUE OF MATERIAL FACT PRECLUDED THE DISTRICT COURT FROM INTERPRETING THE MEANING OF 1999 COMPACT § 4.3.2.2(a)(1) AS A MATTER OF LAW.

Throughout this case the State has pursued a strategy of delay, as it has with Indian tribal issues generally. Thus only today, with half of the 20-year term of the 1999 Compact passed, have any tribes been able to obtain a judicial declaration of the meaning of two of the most critical provisions of the 1999 Compact: the number of gaming device licenses available to tribes that do not already operate the 2,000 maximum devices permitted under the 1999 Compact; and the proper assignment of draw priority in the license allocation process.

Under the State's unilateral administration of that process, the State effectively prevented many tribes from obtaining the additional licenses to which they were entitled under Compact §4.3.2.2(a) in two ways. First, the State arbitrarily suppressed the number of licenses allowed to be drawn. Second, the State punitively deprived tribes of their proper draw priority by reducing a tribe's draw priority every time it participated in a round of license draws, no matter how

few licenses a tribe had drawn, and even if a tribe received only a small portion of the licenses that it had requested.

As a result, tribes such as Colusa and other tribes that had not operated a large number of gaming devices on September 1, 1999, and did not have either the financing or the demand to expand to 2,000 gaming devices within the first year or two of the Compact's term effectively were shut out of the draw process. These tribes were unable to expand their gaming operations incrementally and responsibly in response to growing market demand, unless they abandoned their 1999 Compacts and instead negotiated new compacts that included onerous concessions, financial and otherwise, to the State.

Because Colusa had moved for summary judgment in its original action before that action was dismissed for failure to join other tribes as parties, the State was well aware of Colusa's contentions concerning the circumstances under which the 1999 Compacts were negotiated, and the tribes' interpretation of Compact §4.3.2.2(a)(1). Although the State could have conducted discovery in Colusa's second action ("Colusa II") or on remand in Colusa I, it declined to do so. Although the district court cautioned the parties that

> **failure to raise a dispositive legal issue that could have been tendered to the court by proper pretrial motion prior to the dispositive motion cut-off date may constitute waiver of such issue,**

(SER 204-217), nothing compelled the State to file a motion for summary judgment on the size of the license pool. Nonetheless, the State did so, contending that there was no genuine issue of material fact as to that claim. ER 246-248.

Federal Rule of Civil Procedure 56 provides that when a party has moved for summary judgment, whether with or without supporting affidavits,

> (2) The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c)(2).

Both the State and the plaintiff Tribes submitted extrinsic evidence in the form of declarations and documentary exhibits in support of their respective understandings of the number of gaming device licenses authorized by §4.3.2.2(a)(1). Most of that evidence was devoted to the history of the negotiations leading up to the State's September 9, 1999 presentation of the final draft of what would become the 1999 Compacts, and various subsequent public and private statements as to the parties' subjective interpretations of the number of gaming devices and/or gaming device licenses authorized statewide by §4.3.2.2(a)(1). Although various declarants had differing recollections of a few specific events during the negotiations, there were no disputes about the facts upon which application of the formula depends: *i.e.*, the number of tribes that were operating

more than 350 gaming devices on September 1, 1999, the number of tribes that were operating some, but fewer than 350 gaming devices on September 1, 1999, the number of tribes that signed 1999 Compacts and the number of tribes did not sign 1999 Compacts.

The district court noted that both before and after the Compacts were signed, the State's own chief negotiator offered three different interpretations of the total number of gaming devices authorized (44,448, 44,798 and 45,206) (ER 66, 68), that the California Gambling Control Commission, in concluding that the Compact authorizes the issuance of 32,151 licenses, had expressly repudiated the various totals given by the State's own chief negotiator as not being consistent with the Compact's language, ER 68, 71, but that the CGCC's after-the-fact interpretation of the formula, which had both accepted and rejected parts of the State's chief negotiator's reasoning, also was not reasonably supported by the Compact's language. ER 74.

On the other hand, the district court found that the interpretation initially offered by Colusa and Picayune also could not be supported by the Compact's plain language, because that interpretation assumed that tribes that did not sign compacts were to be counted as "authorized" to operate up to 350 gaming devices, when in fact tribes that did not sign compacts were not authorized to operate any gaming devices. ER 74.

Having found the parties' proffered extrinsic evidence unhelpful, the district court focused on the plain language of the section. The district court plugged the core facts that the parties did not dispute into the Compact's formula, and arrived at a number of licenses that the Court found to be reasonable and consistent with both the language and purpose of the Compact: 42,700.

Specifically, the district court found that,

> ... among the three calculations proffered by the parties, the alternative formulation most accurately follows the language of § 4.3.2.2(a)(1), giving the words their ordinary meaning. As set forth above, the dispute between the parties arises out of the interpretation of the second part of the equation, "the difference between 350 and the lesser number authorized under Section 4.3.1." The alternative formulation starts out with the basic determination of "the lesser number authorized." Under § 4.3.1, tribes may not operate more than the larger of (a) the number of devices they were operating on September 1, 1999 or (b) 350 devices. It is undisputed that as of September 1, 1999, 23 tribes were operating more than 350 devices, totaling 16,156 devices in the aggregate. As such, the total number authorized under § 4.3.1(a) is 16,156. 39 other tribes, which were operating less than 350 licenses, signed 1999 compacts. (See Stip. R. 67A-B). [Fn. Om.] By the plain language of the Compact, all of these tribes were "authorized" to operate at least 350 Gaming Devices. (Compact § 4.3.1). Therefore, the total number of devices authorized under § 4.3.1(b) is 39 multiplied by 350, which results in 13,650. (See also Stip. R. at 65). The lesser number authorized under § 4.3.1 is 13,650 because it is a smaller number than 16,156. Next, the Compact calls for the difference between 350 and the lesser number authorized. [Fn. Om.] The difference between 350 and 13,650 is 13,300. That number is to be added to the formula's first part, which

> the parties agree is 29,400. Therefore, the total number of Gaming Devices authorized under § 4.3.2.2(a)(1) of the Compact is the sum of 29,400 plus 13,300, which equals 42,700.
>
> Both defendants' and plaintiffs' other formulations force a more strained reading of the Compact language. Both of these formulations require that 350 be multiplied to an undetermined number, either 16 or 84. This multiplier is not provided for by the language in § 4.3.2.2(a)(1). Under defendants' interpretation, only the 16 tribes that were operating devices as of September 1, 1999 were "authorized" to conduct Gaming Devices. However, under the plain language of the Compact, any tribe that signed a Compact was authorized to operate Gaming Devices. On the other hand, Colusa and Picayune's original interpretation sought to multiply 350 by 84, the number of non-Compact tribes who operated less than 350 devices, even if many of those tribes did not sign a compact. Because tribes who did not sign a compact could not be "authorized" under that compact, this interpretation also reads out an essential term. [Fn. Om.] In contrast, the alternative formulation gives the term "authorized" its plain meaning.

ER 73-74.

The district court, having given §4.3.2.2(a)(1) its plain meaning, properly proceeded to grant summary judgment to Colusa and Picayune as a matter of law.

B. THE DISTRICT COURT PROPERLY ORDERED THAT ALL ELIGIBLE TRIBES BE PERMITTED TO PARTICIPATE IN THE GAMING DEVICE LICENSE DRAW.

Although Colusa and Picayune filed separate actions, each tribe requested by way of relief that the district court order that the CGCC conduct a round of draws

open to all 1999 Compact tribes for the 10,549 additional licenses made available by the district court's judgment, and the district court granted that relief. The State now contends that the district court erred because it would confer an unwarranted benefit on non-party tribes with 1999 Compacts.

Colusa, Picayune and numerous other tribes have been trying for many years to obtain additional licenses. Some tribes filed lawsuits against the State,[1] but until this Court ruled in Colusa's original action that other tribes with 1999 Compacts were not required parties to an action to determine the size of the statewide license pool, the State stonewalled these attempts to obtain a judicial interpretation of the meaning of this most critical Compact provision.

By granting the requested relief and opening the draw to all Compact Tribes that did not already operate 2,000 gaming devices, the district court followed the clear intent of this Court's opinion in *Colusa I* that a judgment in Colusa's favor on the size of the license pool would benefit other tribes seeking additional licenses under the 1999 Compact. The district court adhered to the Compact's provisions regarding the process by which tribes may obtain licenses to operate additional gaming devices (those provisions do not allow the exclusion of any eligible tribe from a round of draws). The district court gave effect to the Compacts' purpose of allowing tribes with casinos to enhance their ability to generate additional revenues with which to fund tribal government operations and the provision of services and programs to their Reservation communities. The district court's judgment

[1] Among them, the Rincon and San Pasqual Bands.

increased the direct payments into the Revenue Sharing Trust Fund for redistribution to Non-Compact Tribes.

CNIGA's member tribes, which include both Compact and Non-Compact Tribes, all have benefitted from the district court's order finally implementing the 1999 Compacts as intended. The State has suffered absolutely no prejudice by reason of tribes being able to meet the demands of their markets and the influx of additional funds into the Revenue Sharing Trust Fund, all under the terms and limits negotiated in good faith by the tribes ten years ago.

IV. CONCLUSION

For all of these reasons, *amicus curiae* CNIGA respectfully requests that the Court affirm the District Court's judgment in its entirety.

Dated: December 23, 2009

Respectfully submitted,

By: /s/ FRANK R. LAWRENCE
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California Nations Indian Gaming Association

CERTIFICATE OF SERVICE

Case name: *Cachil Dehe Band of Wintun Indians, et al. v. State of California, et al.*
Case No.: 09-16942

I hereby certify that on December 23, 2009, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

BRIEF OF *AMICUS CURIAE*

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 23, 2009, at Nevada City, California.

Frank R. Lawrence	/s/ Frank R. Lawrence
Declarant	Signature

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